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IN THE

Supreme Court of the United States

October Term 1953

ANNE HALBACH BUMSTED and MARY ELIZABETH KEMMERER, Succesors in Interest to ELIZABETH S. HALBACH and FRANKLIN H. STAFFORD, Trustees under Agreement of Trust, Made by Ernest K. Halbach, dated December 6, 1940, *Petitioners,*

v.

JAMES E. MARKHAM, as Alien Property Custodian, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Your petitioners, Anne Halbach Bumsted and Mary Elizabeth Kemmerer, cestuis-successors in interest to trustees under an agreement of trust, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on November 2, 1953.

OPINIONS BELOW

The opinion of Circuit Judge McLaughlin of the Third Circuit, sitting by designation as the District Court (R. 66-79), is reported at 106 F. Supp. 475. The *per curiam* opinion of the Court of Appeals for the Third Circuit

affirming the judgment and adopting Judge McLaughlin's District Court opinion (R. 398-399) is reported at 207 F. 2d 503.

JURISDICTION

The judgment of the Court of Appeals was entered on November 2, 1953 (R. 399). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. § 1254 (1).

SUMMARY

This petition seeks to review conclusions drawn by a Court of Appeals judge sitting alone by designation as a District Court and affirmed by the same Court of Appeals without discussion. That decision denied a motion to reopen a judgment in a suit under Section 9(a) of the Trading with the Enemy Act entered by stipulation during the war without a trial on the merits, and to allow the petitioners to try the suit on the merits after the war.

The only remedy which petitioners seek is the right to try in a court on the merits for the first and only time, in a period free from wartime prejudice, this suit under Section 9(a) of the Trading with the Enemy Act for the recovery of their property (corporate stock, all of which the Government still holds) confiscated by the Alien Property Custodian from petitioners' predecessor trustees. In such a trial the issue on the merits will be whether the property of petitioners was the property of an "enemy". Petitioners do not ask this court to return their property. They ask only the right to try on the merits for the first time in a proper lower court their right to the return of their property.

From the standpoint of the public interest involved this is a significant "loyalty" case which has already attracted public and congressional discussion.[1] It involves

[1] See Hearings Before a Subcommittee of the Committee on the Judiciary, United States Senate, 83d Cong., 1st Sess., on S. 34, S. 145, S. 151, S. 155, S. 249, S. 373, S. 1765, S. 2171, S. 2231, S. 2315, and S.J. Res. 92, at pp. 223-241, 311-441.

protection of temporarily unpopular citizens against zealous and ambitious Government officials and the degree to which as a practical matter the law and the courts can afford such citizens any timely protection—particularly in the fundamentally dirty business of confiscation of private property to compensate public injury and satisfy public revenge.

The unpopular citizens herein involved are unpopular citizens in World War II as distinguished from prospective unpopular citizens in the unending legal state of war emergency in which this generation will presumptively always live. The rights of all citizens are involved because each turn of the wheel of national and world events pushes a different suspected group into the mire of public disfavor. The unpopular groups in World War III will not be the unpopular groups of World War II.

The courts will always have to adjudicate the struggle between temporary public passion, inherent justice to individuals, and international necessity to make past enemies future allies.

Petitioners' predecessor trustees began this suit under Section 9(a), which alone makes the Trading with the Enemy Act constitutional. They were frightened out of it after the case was set for trial and was shortly to be tried during the most passionate period of World War II—the time of the Battle of the Bulge, Bastogne, and the Malmedy massacres. The predecessor-trustees then accepted a payment by the Alien Property Custodian of less than one-fourth of the value of the property as then admitted by the Government, for a purchase of the property by the Alien Property Custodian, the release of all claims to it, and the dismissal of the Section 9 (a) suit. The release-purchase was consummated on January 27, 1945.

The price paid by the Alien Property Custodian and accepted perforce by the predecessor-trustees was a price to

which, the Government negotiator coldly pointed out, the Government had power to reduce the value of the property irrespective of the ultimate success of the Section 9(a) suit. This manipulation was not possible through power given to the Alien Property Custodian by Congress, but it was possible through power collaterally accruing to the Alien Property Custodian by reason of his legal position as stockholder after confiscation, exercising stockholders' powers through the very confiscated stock.

In the intervening years there have been dissipated either by Government administrative action or by acquittal on trial by jury collateral forms of charges of disloyalty made by the Government against petitioners or their family at the time of the confiscation of this property. The Government has, however, persistently asserted this release-purchase in bar of a motion pending since 1951 to reopen this suit and try on the merits for the first and only time the fundamental question of the "enemy" status of claimants and the inescapable implications of their disloyalty.

There is an immediate analogy between this purchase settlement-in-bar made under these wartime circumstances and the kind of compromise advised today by practical counsel where even the most demonstrably loyal Government employee, falsely accused of disloyalty but without unlimited financial resources and with concern for the future, takes advice to "resign quietly" from a Government position and his source of livelihood rather than face indefinite persistent proceedings in an antagonistic atmosphere.

The Government still holds all the stock which will be the subject of a trial of this suit. This case comes before this Court at a time when the interpretation and application of the Trading with the Enemy Act by the Alien Property Custodian during and since World War II is most seriously challenged in the Congress.

Broadly speaking, the issues presented by this petition are (a) whether the Alien Property Custodian has discretion unlimited by Congress to spend money belonging to the United States coming into his hands in the administration of the Trading with the Enemy Act; (b) whether the Custodian himself may trade with the enemy under the Trading with the Enemy Act, i.e., whether he may trade for and return vested property to persons whom he considers to be enemies within the meaning of that Act; (c) whether if the Alien Property Custodian does not have such power, the Attorney General has an implied power beyond the provisions of that Act, to trade for their property with persons he considers to be enemies under that Act; and (d) what is the proper standard of voidability for overreaching to be applied by federal courts in passing on wartime transactions between the Government and citizens charged with disloyalty.

The Custodian obtained the money which he paid as consideration for the transaction by which he acquired the stock by compelling the corporation to declare a dividend for this purpose on the very stock in question. To sustain the validity of this bizarre transaction the government urged and the court below adopted a construction of Section 5(b) of the Trading with the Enemy Act which so far as we are aware has never been urged in any other case and which is the exact reverse of the administrative interpretation of that section at the time this transaction was consummated. This unique interpretation—that Section 5(b) gives the Alien Property Custodian unlimited power to return vested property—flies in the face of an obviously contrary intention of Congress. Moreover, it has the surprising effect of nullifying not only the limitation in the previously-enacted Section 9(a) that vested property could not be returned to an enemy (which this Court has said includes those with an "enemy taint") but also the detailed conditions precedent to the return of vested property as prescribed in the subsequently-enacted Section 32.

In addition, the decision below gives the Custodian complete freedom to spend the money coming into his hands, without the necessity for a congressional appropriation and no longer restricted by the requirement of Section 12 of the Act that such money be placed in the Treasury for investment in government securities. Even in the everyday affairs of government such broad power would be dangerous. In the dirty business of the confiscation of private property—particularly that of American citizens—it opens the door to abuses which would pale even the sorry history of alien property administration following World War I.

An equally fundamental problem is involved in the rejection by the court below of petitioners' claim that the transaction waiving the right to suit under Section 9(a) is, as a bar to suit, voidable for duress or at least for overreaching. The standards required by the court below for proof of coercion justifying voidability of such a transaction are utterly unrealistic. Proof of duress by the government is admittedly difficult. If proof of a conspiracy on the part of government officials to overreach the private citizen is to be required as indicated by the court (R. 67-68, 71), the task becomes virtually impossible and the law needs restatement and equitable extension to keep pace with the growth of governmental powers. The late Senator Taft expressed this view in a letter to Attorney General James P. McGranery, as follows:[2]

"HON. JAMES MCGRANERY,
The Attorney General,
Department of Justice,
Washington, D. C.

"DEAR MR. ATTORNEY GENERAL:

"This acknowledges your letter to me concerning the Halbach case. Your letter must have crossed my second letter to you of January 3, agreeing with the arguments of Senator Langer's letter to you of January 2, concerning the same case. I cannot help but feel that

[2] Hearings, *supra* note 1, at pp. 273-274.

your letter must have been prepared before you yourself had opportunity to read Senator Langer's letter and my second letter, since your reply reflects a misunderstanding of my views.

"I am fully cognizant of the successful technical position of the Government behind its "purchase release" of the Halbach stock. Let me point out, however, that a trial on the merits of that technical defense is not a trial on the merits of the Halbach case. Whether Halbach can technically prove duress—always an almost impossible burden to sustain—the very opposition of a wartime government and the relative helplessness of a citizen in a negotiated wartime sale does create presumption of overreaching by government, even though there might not be technical duress which is provable in a court.

"A trial on the merits, in my judgment, is a trial of the fundamental issue, namely, whether the Halbachs were enemy nationals or cloaks for enemy nationals, so that government was entitled to seize their property prior to its "purchase" after seizure. Such a seizure does carry an implication of disloyalty in time of war. It is important that a government dedicated to doing justice that it look beyond the merits of technical devices and examine the fundamental issues of justification for the confiscation of property in the first instance and the implication of disloyalty that so easily goes with it. If the Government acted properly and legally in this matter, it has nothing to fear or to lose since the court would confirm such seizure. If this was not a proper action by government, it should not hide behind a technical curtain and prevent a citizen from asserting his rights on the basic merits involved.

"I am convinced in the interest of justice that the Department of Justice, under which this confiscation was effected, should lend every effort to clarify the matter before it goes out of office. I respectfully suggest, therefore, that you re-examine the whole matter in the light of my second letter and also the letter of Senator Langer.

"Respectfully,

"ROBERT A. TAFT"

QUESTIONS PRESENTED

1. Whether the provision of Section 5(b), as amended, of the Trading with the Enemy Act, which directs that property vested under that Act "shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States" authorizes either

(a) an administrative return by the Custodian to the former owner of any interest in such vested property or

(b) the use of a part of the income from such vested property to purchase from the former owner thereof his claim for its return.

2. Whether a natural claimant (as distinguished from a corporate claimant) under Section 9(a) can be treated under the Trading with the Enemy Act as being at the same time enemy as a justification for the retention of his property and non-enemy as a justification for paying to him income from the vested property.

3. Whether, irrespective of limitations on the Alien Property Custodian under the Trading with the Enemy Act, the authority of the Attorney General to control the defense of suits against the United States empowers him, as a means of settling a suit for the return of stock vested under the Trading with the Enemy Act, to pay out to the claimants, as consideration for a release of their claim, money received as a dividend on the vested stock, despite the fact that the Attorney General maintains that these claimants are "enemies" ineligible under Section 9(a) for a return of the stock itself.

4. Whether the term "the end of the war" used in the first and last paragraphs of Section 12 of the Trading with the Enemy Act refers only to the end of World War I, so that none of the protective requirements of Section 12 apply

during World War II to the disposition and management of all money and other property coming into the hands of the Alien Property Custodian pursuant to the other provisions of the Act.

5. If question 4 above is answered in the negative, whether the requirement in Section 12 of the Trading with the Enemy Act that "All moneys * * * paid to or received by the Alien Property Custodian pursuant to this Act shall be deposited forthwith in the Treasury of the United States, and may be invested and reinvested by the Secretary of the Treasury in United States bonds or United States certificates of indebtedness * * *" is impliedly repealed by the provision in the 1941 amendment to Section 5(b) of the Act that vested property "shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States * * *".

6. If an Assistant Attorney General of the United States negotiating a release-purchase of a claim under Section 9(a) of the Trading with the Enemy Act threatens, unless the claimants meet his terms, to exercise government power to manipulate the claimed property in such a way as to limit its recovery value for the claimants to a fraction of its value, does that threat *per se* render voidable such release-purchase agreement (particularly in the light of the requirements of Section 9(a) of the Act that vested property which is the subject of suit must be retained by the Custodian until the suit is terminated).

7. Whether proof of duress and overreaching on the part of the federal government adequate to render voidable a release by a citizen of his right to sue the federal government requires (a) a showing that the government officials whose actions contributed to the overreaching of the citizen acted in bad faith and pursuant to a conspiracy, or (b) meeting of standards of duress adequate to make a transaction voidable between private parties.

STATUTES INVOLVED

The pertinent portions of Sections 5(b), 9(a), 12 and 32(a) of the Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U. S. C. App. § 5(b), 9(a), 12 and 32(a), are printed in Appendix, *infra*, pp. 41-49.

STATEMENT

Ernest K. Halbach, the father of the petitioners, now 70 years old, is a native-born citizen of the United States (Philadelphia, 1883) (R. 20). His father was born in Germany and became a citizen of the United States by naturalization (R. 20). His mother, wife, and children are native to the United States (R. 20, 22).

By January, 1940 Halbach, a stockholder and officer of General Dyestuff Corporation since its incorporation in New York in 1925 and a persistent accumulator of its stock, had acquired voting control (52%) of that corporation (hereinafter referred to as "GDC") (R. 21, 23).

In December, 1940 Halbach made an irrevocable gift in trust of his shares to two native-born American trustees for the lifetime benefit of his native-born wife and the ultimate benefit of his two daughters, the petitioners herein (R. 22). The validity of this gift was investigated and recognized by the U. S. Treasury (R. 164).

On June 30, 1942 the then Alien Property Custodian, Leo T. Crowley, acting under authority of Section 5(b) of the Trading with the Enemy Act, vested all outstanding shares of GDC as "the property of Nationals of a Foreign Country designated in Executive Order No. 8389, as amended" (R. 8-10). At the time of the vesting, all outstanding shares of GDC were owned by United States citizens, subject to an option by agreement among such United States citizen stockholders running to the corporation itself to purchase the shares (a) if at any time a stockholder desired to dispose of the same; or (b) upon the death of a stockholder; or (c) if a stockholder was an officer or em-

ployee, upon the termination of his relationship with the corporation (R. 160).

There were no other options (R. 160).

Immediately following the vesting, Halbach was dismissed as President of GDC, a position he had held since 1930, and Col. Louis A. Johnson was made President by the Custodian. But at the same time the APC-appointed directors continued Halbach in the employ of GDC as a "special consultant", in which capacity he continued the active management of the company for eight years until he was separated in August, 1950 (R. 158-159, 171). During the war, the government also made use of his services as a member of the Dyestuff Manufacturers' Industry Advisory Committee, which advised the War Production Board in the technical dyestuffs field, and received official letters of commendation for his services (R. 165, 171).

The legal theory for the vesting was that Halbach, his American trustees and the other ten American stockholders of GDC were "Nationals of a Foreign Country * * *" (R. 8). However, Leo T. Crowley, who vested the stock, has stated in this case that the primary reason for vesting was that GDC had a sales agency contract with General Aniline & Film Corporation (hereinafter referred to as "GAF") which had previously been vested by the Treasury, and that for this reason the APC staff felt that proper administration of GAF required control of its sales agency, GDC (R. 170, 276-279, 374-375). The possibility that GDC might be German owned or controlled was a minor factor (R. 281-282, 304). On post-investigation after vesting, *Crowley did not feel "that Halbach was a foreign national"* (R. 305, 376), but he was then advised by his lawyers that without additional statutory authority, he could not administratively return the Halbach stock (R. 277, 305-307, 315, 316, 318, 319-320, 334, 359).

Crowley also acknowledged, however, that even if he had had legal authority to do so he would not have returned the Halbach stock before the end of the war, as

it was advantageous to the government to keep the stock and no harm was being done to the Halbach investment since Halbach was still helping direct the affairs of the corporation (R. 305, 315, 320-321, 377). Moreover, holding the stock until the end of the war insured ample opportunity to develop all possible evidence to sustain the vesting (R. 316, 319, 320, 375). Crowley did feel that holding this property for that period of time was "*a legal and moral wrong,*" but that the choice was between the disadvantage to the country or the individual (R. 316-317.).

Crowley also felt his office had gone farther in vesting the Halbach stock than it had in the case of the property of any other U. S. citizens (R. 307). GAF and GDC were the largest and by far the most controversial of the properties vested and there was more discussion and disagreement on Halbach than any other individual (R. 338, 376-377). Halbach became a bone of contention in the Alien Property office and in the government generally (R. 286, 330). "There was a sort of campaign put on to force [Crowley] to remove Halbach and [Crowley] refused to do it * * *" (R. 286; cf. 326-328).

To give notice of their legal position under Section 9(a) the trustees of the Halbach trust brought the present action on March 17, 1944 under Section 9(a) of the Trading with the Enemy Act, 50 U.S.C. App. § 9(a), to compel the return of the 4,725 shares of stock constituting the corpus of the trust (R. 1, 5-10). Leo T. Crowley, as Alien Property Custodian, was named defendant, but he resigned a few days later and his successor, James E. Markham, was substituted (R. 157-158, 169-170).

Prior to the trial date the release-purchase agreement was entered into, evidenced by an agreement and release signed by the trustees which was attached to a stipulation dated February 2, 1945 dismissing the action with prejudice (R. 13-16). As a part of this transaction the Custodian also obtained personal releases from petitioners and Mr. and Mrs. Halbach (R. 146-153).

The consideration for the release by the Halbach trustees was the payment to them by the Alien Property Custodian of $118 per share for the stock they were claiming (R. 13, 100, 108). The Custodian created a fund out of which to make this payment by using his position as majority stockholder to require his own-appointed board of directors to declare a dividend to the Alien Property Custodian as stockholder (R. 28-29, 59, 387). Out of this fund the Custodian paid the trustees the purchase price under the settlement and the action was dismissed with prejudice (R. 16). A Department of Justice press release issued at the time ascribed a book value to the stock "in excess of $540 per share" (R. 28-29, 386-388).

Not all GDC stockholders were treated alike, the Custodian taking the opportunity to trade a different deal with each for exactly the same property. The Halbach trustees received $118 per share. Another stockholder, Mrs. Emily St. George, who refused to "settle" until after the cessation of hostilities, received $365 per share. Still another stockholder Mr. Duisberg, against whom a default judgment was taken, received nothing.

The trustees subsequently died and the trust terminated (R. 182, 189, 190, 195). Thereafter petitioners as the successors in interest of the trustees filed a motion in the District Court on January 25, 1951 asking that they be substituted as plaintiffs in this action, that the then Attorney General be substituted as defendant for Markham, Alien Property Custodian, and that the stipulation of dismissal and the releases on which it was based be vacated and declared null and void (R. 17-19). This motion, made under Rule 60(b)(6) of the Federal Rules of Civil Procedure, was based on two grounds: (1) that in effecting the so-called "settlement" of the action and purchasing the property which was the subject thereof, the Alien Property Custodian acted illegally and beyond the scope of his powers, and (2) that the releases on which the stipulation of dismissal was predicated were executed under duress (R. 18-19).

Petitioners' motion was supported by various affidavits, including their own (R. 181-195); those of Mr. Halbach (R. 157-169, 28-29, 199-206); of Leo T. Crowley, who as Alien Property Custodian had vested their stock (R. 169-181); of Judge John J. Burns, who was appointed counsel for General Dyestuff Corporation by Mr. Crowley and in that capacity made a careful investigation into the affairs of GDC and the character and possible enemy affiliations of Mr. Halbach (R. 39-40); and of E. Maine Shafer, who as an investigator for the Office of Alien Property Custodian had, in 1943, with the help of an associate, compiled a complete history of GDC and all its current and prior stockholders with a view to determining whether the vesting of the GDC stock in 1942 was a proper vesting under the Trading with the Enemy Act (R. 63-65).

The government filed opposing affidavits, principally those of Herbert Wechsler, who as Assistant Attorney General had represented the government in the negotiations leading up to the settlement (R. 89-104), and James E. Markham (R. 105-109). In addition, the government took the depositions of Mr. Crowley (R. 260-388) and of Stoddard M. Stevens, Jr., a member of the law firm of Sullivan & Cromwell, who had represented the trustees (R. 112-145, 209-259). The case was submitted to Circuit Judge McLaughlin of the Third Circuit, sitting by designation as judge of the District Court, on the affidavits and depositions, no oral testimony being presented to the court.

Petitioners' claim of duress was based upon a course of conduct by various government agencies the effect of which was to bring such pressure to bear upon Halbach, and through him upon his entire family during the war, as eventually broke their resistance and induced them to settle (R. 162-163, 183, 193-195). The principal features of that course of conduct, as they are discussed in the District Court's opinion, are as follows:

(1) Ernest K. Halbach was indicted with others, including GDC and GAF, in December 1941 for an alleged crimi-

nal conspiracy with German interests to violate the anti-trust law; this indictment was not moved for trial by the government and was pending at the time of the settlement in 1945 (R. 163). In fact, it was still pending in 1951 when Halbach executed his first affidavit in support of the motion to vacate the stipulation of dismissal, but thereafter it was moved for trial by the government and Halbach was acquitted before a jury in the Southern District of New York (R. 67).

(2) In July 1942 immediately after the vesting of the GDC stock, the Treasury blocked the private bank accounts of Halbach, his aged mother, his wife, his brother-in-law (who with Mrs. Halbach was a trustee of the Halbach trust), and his daughter Anne, a petitioner herein, all these persons being American-born. These accounts were kept blocked until *after* the filing of the stipulation dismissing this action with prejudice (R. 67-68, 163-164, 177, 184, 194, 246-247). This action by the Treasury, with its plain implication that every member of the family was an enemy agent, was well-known in their home community and was the direct cause of Halbach's resignation as a director of the Summit Trust Company, a position he had held for some years (R. 163-164, 184).

(3) Begining in the year 1942 agents of the Bureau of Internal Revenue began an intensive investigation and audit of Halbach's income tax returns, although such agents had never theretofore made anything more than a routine check of his returns (R. 166). The Treasury agents who supervised the operation of GDC also subjected Halbach to constant surveillance and by their conduct created the impression in the office that he was under suspicion as an agent of the German government and was not to be trusted (R. 164). The gift tax return covering the establishing of the trust was also investigated, and on one occasion certain government agents, not now fully identified, went unannounced to the Halbach home and ques-

tioned Mrs. Halbach about her husband's "German connections" at a time when she was ill, suffering from cancer (R. 69, 165, 184-185).

(4) Although Halbach was continued in the employ of GDC for eight years after being removed as President following the vesting of the stock, there was almost constant pressure on the Custodian and the management of GDC to dismiss him, and Halbach was made aware of this pressure (R. 68, 107-108, 165-166, 186, 286). Halbach feared that a dismissal in time of war on a charge that he was cloaking for Farben and was a Nazi agent would effectively close all other positions to him (R. 167). The group who were so insistent that Halbach be removed from any connection with GDC (R. 287-291, 299, 331) were in the Treasury, the Office of Alien Property Custodian, the Department of State and the Department of Justice (R. 298). One of the tactics employed by these government employees was "planting stories about [Crowley] protecting Mr. Halbach" (R. 280; cf. 284, 285, 290, 301, 326, 371-373). Eventually Crowley requested and received an informal hearing from the Senate Foreign Relations Committee to explain his position with respect to Halbach and even felt it necessary to go see Mr. Harry Hopkins and the President for the same purpose. (R. 280-281; 288, 290, 302).

(5) While settlement negotiations were in progress, with no agreement reached and with the trial date rapidly approaching, a series of articles appeared in the newspaper "P.M." in which Halbach was characterized as an "ex-aide of I. G. Farben", "one of I. G. Farben's oldest and most trusted pre-war associates in the United States", and an "I. G. Farben agent" (R. 69, 164-165, 193, 196-198, 204). Alien Property Custodian Markham himself conceded that "the memoranda from the files of the Office of Alien Property Custodian, which were cited in the articles, had in all probability been 'leaked' to the press in a wholly unauthorized manner" (R. 109).

(6) In the District Court opinion the government's position during the settlement negotiations was stated as follows (R. 70):

> * * * The Government's position was that Halbach had apparently paid $210,000 for the acquisition of the shares; that the most plaintiffs could possibly recover was $100 a share which was the option price at which General Dyestuff could purchase the stock under an agreement to which the stock was subject; that the Custodian, because of control of General Dyestuff could, if necessary, bring about a situation where he would be able to exercise the options. * * *

The District Court held that there was a failure to meet the tests of duress (R. 72).

The District Court sustained the legality of the settlement on several alternative grounds: (1) that the Attorney General's control of government litigation gave him the power to compromise this suit on any terms he saw fit irrespective of the limitations on the powers of the Alien Property Custodian (R. 73-75); (2) that the broad power over vested property given by Congress in the 1941 amendment to Section 5(b) of the Act[3] authorized the Custodian to transfer vested property as was done here, and specifically that the problem of the Halbach claim to the GDC stock was "*dealt with* in the interest of and for the benefit of the United States" by the Custodian and the Attorney General within the meaning of Section 5(b) as amended [italics in court's opinion] (R. 75-77); (3) that the settlement was in reality the return of an ascertained non-enemy interest in the stock in accordance with the terms of the vesting order, which, the court said, exemplified the broad powers exercised by the Custodian under the amended Section 5(b) (R. 76); and (4) that the settlement was likewise well within a reasonable interpretation of Section 9(a) as a return of a cal-

[3] Section 5(b) of the Trading with the Enemy Act was amended by the First War Powers Act, 1941, Act of December 18, 1941, c. 593, title III, § 301, 55 Stat. 839.

culated non-enemy interest in the stock with the Custodian retaining the enemy interest for the United States (R. 79).

The Court was apparently not impressed by the fact, which was called to its attention, that Mrs. St. George, whose stock was not legally differentiable from the Halbach stock, was bought off at a much higher price than the Halbach stock ($365 per share), and that accordingly the calculated enemy and nonenemy interest in the same stock seemed to vary with the bargaining power of the individual and counsel involved.

The District Court also held that the payment of the purchase price of $118 per share to the Halbach trustees by the Custodian was not in conflict with the provisions of Section 12 of the Act, on various alternative grounds: (1) that the obligation imposed by Section 12 to deposit in the Treasury all money received pursuant to the Act and invest it in Government securities had been terminated in 1939 by an executive order directing the sale of securities then held, because the term "end of the war" in Section 12 referred to the end of World War I (R. 77); (2) that "if Section 12 limits what would be proper under 5(b) as presently worded, the latter section * * * would prevail" (R. 77); (3) that the money used by the Custodian to pay the Halbachs was from his "special account" with the Treasurer of the United States (R. 77-78); (4) and that even if this money had been on general deposit with the Treasurer the payment was proper, as the Treasurer had authority to pay out money for "services" to the Custodian (R. 78).

On appeal to the court of appeals petitioners urged strongly, in addition to their other arguments, that duress, gross injustice and overreaching on the part of the government were conclusively established by the District Court's finding that the government in the settlement negotiations had warned petitioners that their maximum practical recovery was the price offered by the government since "the Custodian, because of control of General Dyestuff could,

if necessary, bring about a situation where he would be able to exercise the options" and thus destroy the value of the stock above the option price in a Section 9(a) suit against the Custodian of the claimant. The Court of Appeals did not discuss any of the issues in the case, but instead in a *per curiam* opinion affirmed the order denying the motion on the basis of the District Court's opinion (R. 398-399).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals, in adopting the opinion of the District Court, erred:

1. In construing the provision in Section 5(b), as amended, of the Trading with the Enemy Act that property vested under that section "shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States" as authorizing the return of vested property or the "settlement" of the issue of the "enemy" or "nonenemy" character between the United States and the former owners of the vested property in a suit brought under Section 9(a) of the Act for the return of such property.

2. In construing the provision of Section 5(b), as amended, of the Trading with the Enemy Act quoted above as authorizing the Alien Property Custodian (or other person designated by the President) to pay out money, received as income from property vested under the Act, to purchase from the former owner of such property his claim under Section 9(a) of the Act for the return of the property.

3. In holding that claimants (who before vesting were the record owners of a majority of the outstanding capital stock of the General Dyestuff Corporation, and whose stock was vested on the government's theory that claimants held title merely as cloaks for a German principal) could under Section 9(a) of the Trading with the Enemy Act be considered as both enemy and nonenemy at the same

time for the purpose of settling their claim by returning a part of the income from the vested property as consideration for the release of their claim to the vested property itself.

4. In holding that the payment to claimants by the Alien Property Custodian of money received by the Custodian as a dividend on vested stock formerly owned by the claimants, in consideration of the release of their claim to the stock itself, was not in conflict with Section 12 of the Trading with the Enemy Act.

5. In holding that the authority of the Attorney General to control the defense of suits against the United States authorizes him, irrespective of the provisions of the Trading with the Enemy Act and the powers of the Alien Property Custodian, to pay out money received as a dividend on stock vested under that Act in order to obtain a release of the former owners' claim against the Alien Property Custodian to such stock.

6. In holding that the purchase-release settlement was not voidable on the grounds of duress and overreaching specifically discussed by the District Court.

7. In refusing to hold that duress was conclusively established by the District Court's finding that the government's position in negotiating with the claimants was "that the most [they] could possibly recover was $100 a share which was the option price at which General Dyestuff could purchase the stock under an agreement to which the stock was subject; that the Custodian, because of control of General Dyestuff could, if necessary, bring about a situation where he would be able to exercise the options."

REASONS FOR GRANTING THE WRIT

1. Although the 1941 amendment [4] to Section 5(b) of the Trading with the Enemy Act did introduce "conflict and confusion" [5] into the Act, the decisions of this Court have in large measure remedied that situation. However, the decision of the court below runs counter to the pattern of this Court's rulings, and by greatly exaggerating the scope of Section 5(b), as amended, 50 U. S. C. App. § 5(b), recreates much of the conflict and confusion which existed before.

In *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480, recognition was given to the broader scope under amended Section 5(b) of the power to vest and to affirmatively compel the use and application of foreign property in a manner consistent with the interests of the United States, but at the same time the right of a claimant "not an enemy or ally of enemy" to maintain a suit under Section 9(a) for the return of vested property was sustained, and the two sections were reconciled by expanding the concept of enemy or ally of enemy to include a claimant with an "enemy taint." 332 U. S. at 484-489. Section 12 was also noted as having a bearing on the powers of the Custodian or other agency designated by the President over vested property. 332 U. S. at 487, footnote 6. Where the "tainted" claimant is a corporation, the severable interest of non-enemy stockholders in the corporate assets, which interest they may protect by intervention in a 9(a) suit brought by the corporation, was recognized in *Kaufman* v. *Societe Internationale*, 343 U. S. 156. In *McGrath* v. *Manufacturers Trust Co.*, 338 U. S. 241, 246, footnote 8, this Court explained that the special proceedings to try the merits of claims to property seized under the Trading with the Enemy Act were those provided in Section 9(a), Section

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[4] By the First War Powers Act, 1941, Act of December 18, 1941, c. 593, Title III, § 301, 55 Stat. 839.

[5] *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480, 489.

32 as amended, and Section 34 of the Act, the last of these dealing solely with debt claims. And this Court had already pointed out in *Markham* v. *Cabell*, 326 U. S. 404, 407, 409, that the Trading with the Enemy Act was designed to operate not only in the first World War but also in any future war unless repealed or superseded, and that only those provisions plainly so intended would be limited to World War I.

The pattern which emerges from these decisions is clear on at least three points:

(i) Section 5(b), as amended, deals with the power to vest property; Sections 5(b) and 12 deal with the powers exercised over the property after vesting; and Sections 9(a) and 32 provide for the determination as between the government and the former owners of vested property of all questions as to the right to the return of such property.

(ii) The right of a claimant to the return of property still turns on whether he is enemy or nonenemy, but an "enemy taint" is sufficient to classify a claimant as enemy, although in the case of a corporation, an artifical entity, nonenemy stockholders are not reached by this "taint" and may assert a severable interest in the corporate assets.

(iii) The provisions of the Trading with the Enemy Act are not limited to World War I in their application, unless the terms of any given provision plainly demand it, e. g., "during the present war" in Section 3(d); limitation on debt claims to those owing "prior to October 6, 1917" in Section 9(e).

The decision of the court below conflicts with the pattern of this Court's interpretation of the Act at all three points:

(i) Section 5(b), heretofore considered by the Court as dealing only with the vesting of property and the use of such property to further the interests of the United States, was extended by the court below to authorize an adminis-

trative return of property to a claimant, including even an administrative partial return of property to a claimant, as part of a trade for a division of the property effected by a release of all claims to the remainder of the vested property (R. 76). Section 5(b) is thus placed in a field which this Court has said is occupied only by Sections 9(a) and 32.*

(ii) The principle laid down by this Court in the case of a corporation with an "enemy taint", that nonenemy stockholders may assert a severable interest in the corporate assets, is extended by the court below to the case of natural persons, who by some unexplained dichotomy are, on the government's own theory, at the same time classified both as nonenemy for the purpose of returning a small part of the claimed property and as enemy for the purpose of retaining the remainder (R. 76, 79; cf. R. 106). In so doing the court below went far beyond what could reasonably be considered within the *Kaufman* decision, which gave relief only to those who were entirely innocent, and came in conflict with the policy of the Act as construed in the *Uebersee* case to bar a recovery by anyone with an "enemy taint."

(iii) Section 12, because it uses the phrase "after the end of the war", is limited to World War I by the court below, despite the fact that there is nothing in this phrase to indicate that the section referred only to the war in progress at the time the Act was passed. This is directly in conflict with the rule of interpretation applied in *Mark-*

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* Section 32, which provides expressly for the return of vested property, was added to the Trading with the Enemy Act by the Act of March 8, 1946, c. 83, § 1, 60 Stat. 50; hence it was not a part of the Act in January 1945 when this case was settled. Petitioners refer to Section 32 to show the unreasonableness of now construing Section 5(b) as covering by implication a field which both Congress and the Executive Branch felt in 1946 required express legislation (see p. 26, *infra*); also to show that the construction of Section 5(b) by the court below nullifies the provisions of Section 32 as to conditions precedent to the return of vested property (see p. 28, *infra*).

ham v. *Cabell, supra,* and with the express recognition in the *Uebersee* case that Section 12 is a part of the statutory framework delimiting the powers of the Custodian or other agency designated by the President over property vested under the Act.

Thus the court below has cut across the whole pattern of the decisions by which this Court has sought to harmonize the 1941 amendment with the rest of the Trading with the Enemy Act. Section 5(b) has never heretofore been construed as dealing in any way with the powers of the Custodian *vis-a-vis* a former owner claiming the return of vested property; the construction of the court below has, however, thrust it into that field, and so brought it again into conflict with Section 9(a), which, until Section 32 was added to the Act in 1946, had always been thought to be the only authority for the return, either administrative or judicial, of vested property.

2. This interpretation of Section 5(b) by the court below is clearly erroneous, being contrary to the applicable canons of statutory construction, to the legislative history of the 1941 amendment, and even to the administrative interpretation which, so far as we have found, has been given to Section 5(b) consistently *except in the present proceeding to set aside the settlement agreement and stipulation of dismissal.*

To sustain the settlement here on the ground that the Custodian and the Attorney General "dealt with [the Halbach stock] in the interest of and for the benefit of the United States" (R. 76-77) ignores the rule of *ejusdem generis,* by which the general term "or otherwise dealt with" should be limited in meaning to the scope of the preceding specific terms, "held, used, administered, liquidated, sold." *Fitch Co.* v. *United States,* 323 U. S. 582, 585-586. None of these terms can reasonably be considered as referring to the determination of rights between the Custodian and the former owner of vested property. Also, to interpret Section 5(b) as conferring power to return

vested property, a subject fully covered by Sections 9(a) and 32, makes it redundant, a construction to be avoided if possible. *Singer* v. *United States,* 323 U. S. 338, 344.

This Court has reviewed the legislative history of the 1941 amendment to Section 5(b) and said that it extended the vesting power to include any property of any foreign country or foreign national so as to reach enemy interests masquerading under innocent fronts, and it also gave the power "to affirmatively compel the use and application of foreign property in a manner consistent with the interests of the United States." *Clark* v. *Uebersee Finanz-Korp.,* 332 U. S. 480, 487. The congressional debates are replete with evidence to sustain this view.[7] Enlarged power to vest and use does not imply enlarged power to return vested property. Obviously Congress was not, eleven days after Pearl Harbor, concerning itself to see that ample authority was being given to return any property which would be vested.[8]

As for the administrative interpretation of Section 5(b)

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[7] This comment by Rep. Hancock (87 Cong. Rec. 9861) is typical: "• • • There is another very important change in section 301 from the present Trading with the Enemy Act. Under our former law I think we still have power to seize enemy alien property and under our present law of export control we have considerable additional power over alien property, but this goes much further and gives the agents appointed by the Government the power to seize any property, any and all alien property, whether belonging to friend or enemy, and put it into use. This is a power that has never been enjoyed before by any specific provision and it is important. It gives us the right to utilize the property we take over. The bill covers considerably more ground in this respect than the old act. • • •"

[8] In fact, Senator Taft felt the power to return property should be further restricted. He spoke of the scandal in the past in connection with the Custodian's office because there was "nobody on the other side" when a claimant applied for the return of property, and added, "I wonder if any such danger is guarded against in this particular measure, or whether that is something to be dealt with after the war is over." Senator Van Nuys, in an ambiguous reply, expressed the view that this was largely a matter of administration rather than legislation. 87 Cong. Rec. 9845.

certainly the view of the Office of Alien Property during Mr. Crowley's tenure as Custodian was that there was *no* power to return even property wrongfully vested without a further amendment to the Act (R. 277, 305-307, 315, 316, 318, 319-320, 334, 359). Further light was shed on this subject by Mr. Raoul Berger, formerly General Counsel for the Office of Alien Property Custodian, when he explained during recent public congressional hearings * that the Department of Justice and the Treasury had taken the position that Section 5(b) superseded the entire Trading with the Enemy Act, so there was no power to return property.

This is the very antithesis of the government's present contention, sustained by the court below, that Section 5(b) itself conferred power to return property.

Moreover, Section 32, which expressly authorizes the return of vested property, was added by the Act of March 8, 1946, c. 83, § 1, 60 Stat. 50, on the basis of testimony by James E. Markham himself and a letter signed by Markham, Joseph C. Grew, Acting Secretary of State, and Francis Biddle, Attorney General, to the effect that legislation was needed to authorize returns. Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 79th Cong., 1st sess., on H. R. 3750, pp. 3, 7. Even as late as 1947, in its petition for certiorari in the *Uebersee* case (No. 35, October Term, 1947) the government, after asserting that in general the Custodian had been vesting only where he believed property was enemy owned or controlled, or where the vesting was deemed advisable to conserve the property of a resident of enemy-occupied territory, added (pp. 8-9):

> • • • Where that belief is shown to be unfounded or the reasons which motivated the vesting have dis-

* Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, 83rd Cong., 1st sess., on S. 34, S. 145, S. 151, S. 155, S. 249, S. 373, S. 1765, S. 2171, S. 2231, S. 2315, and S.J. Res. 92, at page 337.

> appeared, the Custodian is now empowered, as a result of the recent enactment of Pub. L. 322, 79th Cong., 2d Sess., March 8, 1946, to return the property, upon a finding that return is in the interest of the United States. * * *

Unquestionably the government as late as 1947 did not consider that any power to return property was granted by Section 5(b), and we know of no other case in which the government has urged that there was such a grant in Section 5(b). The court below was led into error on this question by an *ad hoc* contention.

3. Several aspects of the decision below make review by this Court important. First, there is the unrestricted nature of the power to return vested property, or to trade for a division of the property, given to the Custodian by this new interpretation of Sections 5(b) and 9(a). Section 9(a) does not recognize any person as a proper claimant who is "an enemy or ally of enemy", which under the *Uebersee* case includes any person with an "enemy taint." Thus the Custodian, when he is acting under the authority of Section 9(a), cannot properly turn over any vested property, the proceeds thereof, or the income therefrom, to anyone in the proscribed category. Yet this is precisely what the court below condoned, on the sophistical theory that "the foundation of the settlement from the standpoint of the Custodian was the return of the calculated non-enemy interest in the stock with the Custodian for the United States retaining the enemy interest" (R. 79). Such a theory cannot mask the true import of the ruling, where the so-called "enemy interest" arises because of an alleged cloaking of enemy ownership and control of the stock maintained through the agency of the very claimants to whom is returned the so-called "calculated non-enemy interest." Strangely enough, Markham himself repudiated this theory for according favorable treatment to those guilty of cloaking for the enemy in urging the enactment of Section

32(a)(3) in its present form (set forth in Appendix, *infra*, p. 48). Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 79th Cong., 1st sess., on H. R. 3750, page 37.

Likewise, if Section 5(b) is construed as a source of power to return, the only limitation on that power is that the vested property be "dealt with in the interest of and for the benefit of the United States" (R. 77). As a practical matter, this is no limitation at all. In the court below the government very boldly suggested that the question whether vested property was so dealt with in a transaction of this nature was not open to judicial review. To allow this interpretation to stand will completely nullify not only the limitation on return in Section 9(a), properly construed, but also the limitations in Section 32, enacted in 1946, in which Congress provided a detailed list of conditions precedent before vested property could be returned (Appendix, *infra*, pp. 45-49).

Moreover, the extent to which Section 12 retains vitality, if it retains vitality at all, is another question which should be clarified by this Court. The money which the Custodian paid as consideration for the release of the claim to the stock should, under Section 12, have been deposited forthwith in the Treasury, where it would have been available for investment and reinvestment by the Secretary in United States securities under regulations prescribed by the President. See Appendix, *infra*, pp. 43-45. To say, as does the court below (R. 78), that the Secretary is authorized to withdraw such monies for the purpose of making any payment pursuant to the provisions of the Act begs the question. Whether this was a payment pursuant to the provisions of the Act turns on whether this money could be withdrawn and "used" by the Custodian at his discretion.[10] Fac-

[10] The reference by the court (R. 78) to the Attorney General's opinion that the Secretary of the Treasury could pay out money for services to the Custodian is irrelevant. The payment in this case was not for services.

tories are "used" by making them produce; stock is "used" (as in this case) by voting it to control the corporation; money, however, can be "used" only by spending or investing it. This case presents squarely the question whether money coming into the hands of the Custodian shall be invested and reinvested by the Treasury in government securities as provided by Section 12, or whether the Custodian himself may expend such money as he sees fit.

The ruling below sustaining the latter position has the practical effect of removing all limitations on the application of money coming into the Custodian's hands. It presents, therefore, a question of public importance, an importance which is accentuated in view of the vast sums of money which have come and will continue to come into the hands of the Custodian and the unhappy history of the administration of alien property. (See comment of Senator Taft, *supra*, p. 25). The administration of property seized during World War II will require a long period of time, the estimates ranging from 20 to 50 years.[11] The interpretation of these most significant provisions of the law should be reviewed to provide a proper guide not only for the administration during that period, but also for the administration of property which will be seized in any future war.[12] And if Section 12 is limited to World War I (R. 77) that interpretation should be stated authoritatively; other courts are relying on Section 12 in their decisions. See *Colton* v. *General Dyestuff Corporation*, 22 LW 2197 (N. Y. Sup. Ct., N. Y. City, Oct. 29, 1953).

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[11] Senator Dirksen, Chairman of the Subcommittee of the Senate Judiciary Committee to Examine and Review the Administration of the Trading with the Enemy Act; in a press release issued January 27, 1954 advised that according to testimony of former Alien Property Custodians, the activities of the Alien Property Office could continue for as long as 50 years unless Congress takes affirmative action.

[12] Another war must be considered as an immediate possibility, since we are still under the President's proclamation of December 16, 1950 (15 F. R. 9029) declaring the existence of a national emergency.

The question whether the Attorney General's power to control and compromise government litigation empowers him to compromise a 9(a) suit in the way this suit was compromised is an additional question of public importance. This matter being in litigation, the Attorney General could undoubtedly within his implied power to compromise litigation have disposed of the property here involved by way of a compromise in any way which would have been within the powers of the Alien Property Custodian. The decision below goes far beyond this. Alternatively it sustains the division and return of property here on the basis of the Attorney General's power to compromise suits against the United States, without reference to the restrictive provisions of the statute which govern the Custodian's disposition of vested property (R. 73-75). Thus this case presents squarely for the first time the question whether the Attorney General's control of the government's interests in litigation authorizes him to dispose of vested property in the especially sensitive and dangerous field of confiscation in a manner Congress has never given the Custodian the power to do.

This question did arise indirectly in the *Kaufman* case and was discussed in the briefs, though not reached in the decision of the case. There the intervenors wished to enjoin a settlement between the government and the claimant corporation, one ground being that it would be illegal, as it would be a "return" which, by increasing the corporate resources, would inure to the benefit of enemy stockholders, thus defeating the purposes of the Act. Opposing this the government argued in part that a settlement differed from a return, as the former was based on such factors as the amount of the offer to settle, the likelihood of victory on trial, etc. The government's position in substance was that what would be illegal as a "return" was entirely proper as a "settlement", that the Attorney General has full power to settle suits by and against the government,

and that the injunction sought by the intervenors would interfere with the Attorney General in the conduct of his duties.[13] *Kaufman* v. *Societe Internationale,* No. 172, October Term 1951, brief for respondents McGrath and Clark, pp. 49-50.

What was merely contemplated in the *Kaufman* case is here an accomplished fact—the Attorney General, in order to settle this case, directed the payment of government money to one who, under the Attorney General's view of the facts, was not an eligible claimant within the meaning of Section 9(a). Whether the Attorney General's control of the defense of suits against the United States authorizes him to do by "settlement" what would be illegal if done administratively is certainly a novel question,[14] and we

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[13] The government also argued that even when viewed as a return a settlement in that case would not violate Congressional policy, citing the provision in Section 32(a)(2)(E) of the Act, 50 U.S.C. App. § 32(a)(2)(E), authorizing a return to a nonhostile corporation although as much as 49% of its stock is owned by enemies. But even if Section 32 had been a part of the Act in January 1945 it would not have provided a similar argument to support the settlement here. Section 32(a)(3), enacted in its present form at the insistence of Markham himself (*supra,* pp. 27-28), prohibits the return to a person who has acted as a cloak for enemies of any part of the property involved in the cloaking operation.

[14] None of the cases cited in the opinion below (R. 73-75) involved the question whether the Attorney General could, as a means of effecting a compromise of litigation, dispose of money or other property owned by the United States in a manner prohibited by statute. Most of them involved merely rights of action, with the question being whether the Attorney General could dismiss prosecution, as in the *Confiscation Cases,* 7 Wall. 454, or initiate prosecution, as in *United States* v. *California,* 332 U. S. 19; *Kern River Co.* v. *United States* 257 U. S. 147; and *United States* v. *San Jacinto Tin Co.,* 125 U. S. 273. In *Swift & Co.* v. *United States,* 276 U. S. 311, it was contended, not that the Attorney General had surrendered some right or property of the government, but that he had exacted from the private litigant more than was proper; in *Castell* v. *United States,* 98 F. 2d 88 (C. C. A. 2, 1938), certiorari denied, 305 U. S. 652, the question was whether the Attorney General could in settling litigation perform a function which under the statute was to be performed by other officers when the matter was handled

submit that this implication of the ruling below on this question is of such obvious significance as to demand review by this Court.

There is a deeper implication that is even more serious. Congress specially defined in the Trading with the Enemy Act the powers it chose to give the Executive Department in respect to the specially dangerous problems of the disposition of other peoples' private property confiscated in war. Irrespective of the manner in which the President, acting by Executive Order, parcelled such powers among various Executive agencies such as the Alien Property Custodian, the Secretary of the Treasury and the Attorney General, it is submitted that the total amount of power so distributed could not exceed the power Congress specially designated to be exercised in this special field.

By the special recognition of this field through enactment of the Trading with the Enemy Act, with its special delimitation of the powers exercisable in it, Congress plainly intended that this specially designated power should not be extendible at the option of the Executive by invocation of general implied powers possessed by branches of the Executive not specifically related to this field.

Nowhere in the powers granted by Congress to the Executive in the Trading with the Enemy Act is there any power to trade with the enemy by dividing confiscated property with a claimant whom the Executive agent finds enemy or tainted—which is exactly what was done in this case.

It is submitted that this court should certainly review this decision below which nullifies Congress' delimitation of the extent of Congress' delegation to the Executive in

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administratively. As for *New York* v. *New Jersey*, 256 U. S. 296, there is nothing in the opinion suggesting that the Attorney General surrendered any government property or prejudiced any federal rights; on the contrary, this Court pointed out that the terms of the stipulation signed by the Attorney General were approved by the Secretary of War, who afterwards embodied them in the construction permit issued to the Passaic Valley Sewerage Commissioners.

this special sensitive and dangerous field of power and which permits the Executive to evade and circumvent Congress' restrictions in such field.

4. The court below applied an improper standard in rejecting the petitioners' claim that the purchase of the petitioners' property and the release of their right to try this Section 9(a) case in court was voidable because of duress and overreaching by government officials in war times.

The standard of voidability applied by the opinion below requires that such government officials be affirmatively proved guilty of conscious bad faith and conspiracy against the citizen and that the plaintiff be not represented by reputable counsel (R. 67-68, 70, 71, 72).

Against this is opposed Senator Taft's realistic standard (*supra*, p. 7) "—the very opposition of a wartime government and the relative helplessness of a citizen in a negotiated wartime sale does create a presumption of overreaching by government, even though there might not be technical duress which is provable in a court." *We submit that this is the proper standard, and that there was nothing before the court below to rebut this presumption.*

The private citizen does not stand on an equal footing with the federal government in matters where their interests are in conflict, even in the relative calm of peacetime. The government exercises rights, enjoys immunities, and has the benefit of presumptions which are available to no other litigant. This disparity in relative strength becomes greater in time of war. Citizens' bank accounts are then blocked on administrative findings which even the courts cannot review. Citizens are assimilated with aliens by administrative findings on the flimsiest pretexts so their property can be confiscated. Other broad emergency wartime powers become available to government officials.

The citizen who traces his ancestry to the enemy country is a vulnerable target for and inevitably bears along with the alien the brunt of the exercise of those powers. The opprobrium inevitably produced by such official suspicion inevitably results in injustice as the harried citizen seeks

to get his name out of the headlines and withdraw into obscurity until the national tension has relaxed.

Whatever may have been the horse-trading standards permissible to government officials up to World War I, the concentration and the extension of the power of government since World War I, and particularly as engendered by World War II, have completely changed the possibility of arms'-length bargaining between the individual citizen and the now colossal power of government.

So much new statute law, so much new administrative power, and so much new power of "government by leak" to agencies of publicity, now blanket every aspect of the citizen's life that the average citizen hesitates to insist on his rights against Government in relation to any particular charge for fear that thwarted government officials will find some other law or charge to bear against him, and the recognition of this power of government to "get" an unpopular person one way or another is a calculable factor in the advice of wary counsel to "compromise" regardless of merits.

One unforeseen aspect of this new overreaching potential of government arises from adding to the direct powers given the Alien Property Custodian's office under statute more subtle powers accruing to such government officials as private corporation officials when the Alien Property Custodian confiscates corporation stock, which under modern conditions is the dominant form of large property.

When this happens the Alien Property Custodian assumes, in addition to statutory powers as a government official, all ordinary powers of a majority stockholder under corporation law. He thereunder appoints his own friends members of the board of directors with corporate powers of directors; and the board of directors so appointed hire and fire the managers and exercise all the powers of private corporation officials under private corporation law.

This pyramid of corporate power upon government seizure power, the ramifications of which could only have been imperfectly understood in the amendments to Trading with the Enemy Act at the beginning of World War II, is vividly

demonstrated in this case, which is a concrete illustration of the reason why, in fairness to the citizen, the standards of permissible trading tactics by the government in time of war must be subject to a new standard of voidability after the war.

In the new role of the Alien Property Custodian's office it is not merely as in World War I a custodian of enemy property to prevent the property being used to help the enemy. It now takes the affirmative role of an active commercial operator of corporations in free commercial productive competition with other free corporations.[18] This more active productive role in competition with other commercial businesses, with its opportunities for commending futures in private enterprise for the Custodian's employees who make the most commercial profit creates an obvious commercial temptation to overreach a citizen whose property would make a desirable "merger" with property already legitimately seized, either to make a more competitively efficient unit during the war or a higher-priced property to sell after the war. In this specific Halbach case it was on the primary ground of administrative convenience, to help make other previously confiscated property more efficient and productive that the Alien Property Custodian admittedly justified the seizure of the Halbach stock in the first place.

In considering a standard of voidability for the Halbach "settlement" the lower court specifically recognized as permissible a trading tactic on the part of the government official negotiating the settlement which precisely demonstrates the potential of abuse by government officials of ancillary corporate powers above described acquired in the vesting of stock. This official was not an underling, but an Assistant Attorney General, a highest level official personally

[18] It is significant that General Aniline & Film Corporation (for the more effective operation of which the Custodian seized GDC (R. 276-279, 374)) is after more than ten years still a private commercial empire of the Custodian's employees operating in direct competition with privately-owned companies such as Du Pont, Allied Chemical & Dye Corp., and Monsanto Chemical Co.

negotiating to impress the Halbachs and their attorneys with government power.

As above described the Halbach trust owned a majority of the GDC stock. Before vesting, therefore, the Halbach family had control of GDC and consequently only with their consent could (a) Halbach be "discharged" from employment by GDG or (b) their stock sold. After vesting the Custodian owned the same majority of the stock, having stepped into the shoes of the trustees as owner thereof. Therefore, as such majority holder the APC could, as a matter of corporation power and without consent of the Halbachs, both (a) discharge Halbach from his employment by GDC and (b) sell the Halbach stock.

By the terms of the stockholders' agreement above described GDC as a corporation had an option to purchase at a minimum price of $100 a share plus interest from the last dividend date all stock (a) offered for sale by any stockholder or (b) belonging to any stockholder who ceased to be employed by the corporation (R. 120, 160). At the time of the settlement of the Halbach suit the option price is admitted to have been less than one-quarter of the value of the stock. (R. 28-29, 386-388).

By abusing its corporate power as majority stockholder to fire Halbach or by offering the Halbachs' seized stock for sale, the APC could "trip the option" at $100 a share. Thereafter, even if the Halbachs should be successful in a 9(a) action, what they would recover would not be their stock, but only the proceeds of the sale under the option at the option price, i. e., $100 a share plus interest.

The court below frankly found and justified (R. 70) and the Department of Justice press release admits (R. 387) that the government official 'trading' with Halbach and Halbach's lawyer in the negotiation for the "purchase release" of the stock made clear to Halbach that if the Halbach trust did not "settle" and sell at the government's offering price of $118 per share, the price according to the option formula, the government had the power above described to reduce the recoverable value of the stock for the Halbach trust in particular to $118 per share ir-

respective of the Halbach trust's success in the 9(a) suit.

By this strategem the government could limit claimants' recovery to the option price, regardless of the merits of their claim to the return of the stock itself. This threatening plan was disclosed to claimants' counsel in the very first settlement conference (R. 92); it was reiterated (R. 94) and put forward as a take-it-or-leave-it basis for settling (R. 95); it was repeated to Mr. Halbach personally (R. 96); it was the basis on which the settlement was made (R. 100, 102, 108-109, 387); and the finding on this subject demonstrates that even the trial court considered it a moving cause for the settlement (R. 70). For an admission of the Government's conscious exercise of this bargaining weapon, see the Department of Justice press release (R. 386-388), which states (at R. 387): "* * * The sum of $118 per share represents the amount which, under certain circumstances, the plaintiffs were obligated to accept for their shares under existing option arrangements between them and General Dyestuff Corporation. * * *"

This threatened sale of this stock to GDC by the Custodian while this suit was pending would unquestionably have been a violation of the requirement of Section 9(a) that when a suit is brought the vested property shall be retained in the custody of the APC or the Treasury until a final decree is entered. See Appendix, p. 43. Hence this artful plan was in fact a threatened breach of the law used as a bargaining weapon to convince the claimants that a full recovery could always be blocked by the government, regardless of the merits of their claim. Such a threat of illegal action is plainly duress, particularly where the threat is made by one of the chief law officers of the federal government. *Furman* v. *Gulf Ins. Co. of Dallas*, 152 F. 2d 891, 894 (C.C.A. 8, 1946); *cf. Robertson* v. *Frank Brothers Co.*, 132 U.S. 17, 23.

The government should be unwilling to retain the fruits of such conduct; the courts certainly should not condone it. To permit the government to use the incidents of ownership acquired by the vesting to defeat the claim for a return—to turn the claimants' own property against them—is a

foul blow and overreaching. Obviously the government will profit in a monetary sense by such tactics, but it is a perversion of the statute to say that a claim handled in this fashion was "*dealt with* in the interests of and for the benefit of the United States * * *" (R. 76-77; italics in court's opinion).

The effect of this ruling below is to interpret the power to use vested property, given by Section 5(b), as the power to use it against the claimant himself, to defeat his claim. We do not believe Congress intended such a result, particularly where the claimants are citizens of the United States. The possibilities of abuse of power inherent in this ruling make review by this court of great importance.[16]

The relation of the government to the suspected citizen is not that of opposing private litigants and cannot be so treated by the courts. Even in the enforcement of the law government officials owe a special duty to the citizen to see that he is not overreached.

The Alien Property Custodian who vested the Halbach stock, Mr. Leo Crowley, has on this record described the retention of the Halbach stock by the Government as "a legal and moral wrong" (R. 316).

The counsel to Mr. Crowley at the time, Judge John J. Burns of Massachusetts, on this record, has described the retention of the stock as "a tragic miscarriage of justice" (R. 40).

The present Alien Property Custodian, Colonel Dallas Townsend, has publicly stated (Hearings, *supra* note 1, at p. 277):

> If I might make another comment, I do not want to be misunderstood. There are a lot of aspects about

[16] No inference adverse to the merits of petitioners' claim should be drawn from the fact that this suit was settled. In *Commissioner of Internal Revenue* v. *Pacific Mills*, 207 F. 2d 177 (C. A. 1, 1953), both the Tax Court and the Court of Appeals found many motives for a settlement by Pacific Mills of charges of OPA price ceiling violations, none of these motives bearing in any way on the merits of the controversy. The private citizen can never negotiate with the federal government on an equal footing, as the latter commands means of harrassment and pressure not found in the arsenal of a private litigant, against which all the lawyers and all the courts in the land can give no protection.

the treatment of Mr. Halbach here that, to put it very mildly, should be deeply regretted by all of us, the citizens and public officials, too.

Having said that, however, I think this ought to be pointed out, too: Whether the seizure was right or wrong, whether the settlement was wise or foolish, a lot of water has flowed under the bridge or over the dam since that time. * * *

We believe that the reasons justifying the review sought herein by petitioners are well set forth by the present Chairman of the Judiciary Committee of the U. S. Senate in a letter to the Attorney General in January 1953, in which he concluded as follows (Hearings, *supra* note 1, at p. 273):

"* * * I feel—and I am joined by many colleagues in this feeling—that you should not insist on the technical obstacle to the trial of this case of the wartime high pressure purchase of the Halbach property. In order to convince the Congress and the public that the Department of Justice is above all interested in protecting the rights of the individual American citizen, we feel that you should permit this Halbach case to be heard immediately by the Federal court on its merits and without regard to the kind of technical defense available to the Government in this instance.

The nub of the matter is that the technical defense of "purchase—compromise" available to the Government in this case was acquired under war conditions and pressures that in themselves removed the safeguards to justice of which our country is so justly proud.

Surely the United States Government desires to take no unfair advantage of any of its citizens at any time. Equally certain, the Government of the United States can have full confidence in the fairness of its own judiciary. If a branch of this Government in its zeal to further the cause of the war brought about a grave wrong it should be the first to wish to right it by a voluntary act on its own part in foregoing any technical advantage it might have acquired against its own citizens. It would certainly seem that the Department of Justice should desire such accepted fairness in the courts rather than require legislation the effect of which might be delayed to work injustice by the pas-

sage of time. Ernest Halbach himself is over 70 years old. His daughters' property was confiscated over 10 years ago. * * *"

May it be surmised that the position of the Attorney General derives from the original mistake of vesting General Dyestuff Corporation not for its enemy character but for administrative convenience (see p. 11, *infra*), because ownership of General Dyestuff would improve (and still improves) the earnings and the selling price of General Aniline and Film Corporation which the Alien Property Custodian still owns and operates?

But Congress did not authorize the expenditure of government funds for that economic purpose. Nor did Congress give either the Alien Property Custodian or the Attorney General the power of King Ahab to take Naboth's Vineyard, "because it is near unto my house."[17]

The equitable jurisdiction of this Court to void this illegal purchase-release and permitting a case to be tried is adequate to prevent the relationship of the United States government with a citizen being geared to "the morals of the market place."[18]

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 1954

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[17] 1 Kings.

[18] "* * * Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. * * *" Cardozo, C. J., in *Meinhard* v. *Salmon*, 249 N. Y. 458, at 464.

APPENDIX

Excerpts From Trading With the Enemy Act of 1917

(50 U. S. C. A. Appendix)

SECTION 5. SUSPENSION OF PROVISIONS RELATING TO ALLY OF ENEMY; REGULATION OF TRANSACTION IN FOREIGN EXCHANGE OF GOLD OR SILVER.

* * * * * * * * * *

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

* * *

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident

to the accomplishment or furtherance of these purposes; * * *

* * * * * * * * * * *

SECTION 9. CLAIMS TO PROPERTY TRANSFERRED TO CUSTODIAN; NOTICE OF CLAIM; FILING; RETURN OF PROPERTY; SUITS TO RECOVER.

(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States * * * may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity * * * (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien

Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * * * * * * * *

SECTION 12. PROPERTY TRANSFERRED TO ALIEN PROPERTY CUSTODIAN.

All moneys (including checks and drafts payable on demand) paid to or received by the alien property custodian pursuant to this Act shall be deposited forthwith in the Treasury of the United States, and may be invested and reinvested by the Secretary of the Treasury in United States bonds or United States certificates of indebtedness, under such rules and regulations as the President shall prescribe for such deposit, investment, and sale of securities; and as soon after the end of the war as the President shall deem practicable, such securities shall be sold and the proceeds deposited in the Treasury.

All other property of an enemy, or ally of enemy, conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder shall be safely held and administered by him except as hereinafter provided; and the President is authorized to designate as a depositary, or depositaries, of property of an enemy or ally of enemy, any bank, or banks, or trust company, or trust companies or other suitable depositary or depositaries, located and doing business in the United States. The alien

property custodian may deposit with such designated depositary or depositaries, or with the Secretary of the Treasury, any stocks, bonds, notes, time drafts, time bills of exchange, or other securities, or property (except money or checks or drafts payable on demand which are required to be deposited with the Secretary of the Treasury) and such depositary or depositaries shall be authorized and empowered to collect any dividends or interest or income that may become due and any maturing obligations held for the account of such custodian. Any moneys collected on said account shall be paid and deposited forthwith by said depositary or by the alien property custodian into the Treasury of the United States, as hereinbefore provided.

* * *

The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have the power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof: *Provided,* That any property sold under this Act, except when sold to the United States, shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of time and place of sale which shall be where the property or a major portion thereof is situated, unless the President stating the reasons therefor, in the public interest shall

otherwise determine: *Provided further,* That when sold at public sale, the alien property custodian upon the order of the President stating the reasons therefor, shall have the right to reject all bids and resell such property at public sale or otherwise as the President may direct. * * * The alien property custodian shall forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such property or rights so sold by him.

* * *

After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct: *Provided, however,* That on order of the President as set forth in section nine thereof, or of the court, as set forth in section nine and ten hereof, the alien property custodian or the Treasurer of the United States, as the case may be, shall forthwith convey, transfer, assign, and pay to the person to whom the President shall so order, or in whose behalf the court shall enter final judgment or decree, any property of an enemy or ally of enemy held by said custodian or by said Treasurer, so far as may be necessary to comply with said order of the President or said final judgment or decree of the court * * *.

SECTION 32. RETURN OF PROPERTY—(a) CONDITIONS PRECEDENT.

The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine—

(1) that the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner; and

(2) that such owner, and legal representative or successor in interest, if any, are not—

(A) the Government of Germany, Japan, Bulgaria, Hungary, or Rumania; or

(B) a corporation or association organized under the laws of such nation: *Provided,* That any property or interest or proceeds which, but for the provisions of this subdivision (B), might be returned under this section to any such corporation or association, may be returned to the owner or owners of all the stock of such corporation or of all the proprietary and beneficial interest in such association, if their ownership of such stock or proprietary and beneficial interest existed immediately prior to vesting in or transfer to the Alien Property Custodian and continuously thereafter to the date of such return (without regard to purported divestments or limitations of such ownership by any government referred to in subdivision (A) hereof), and if such ownership was by one or more citizens of the United States or by one or more corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia: *Provided further,* That such owner or owners shall succeed to those obligations limited in aggregate amount to the value of such property or interest or proceeds, which are lawfully assertible against the corporation or association by persons not ineligible to receive a return under this section; or

(C) in individual voluntarily resident at any time since December 7, 1941, within the territory of such nation, other than a citizen of the United States or a diplomatic or consular officer of Italy or of any nation with which the United States has not at any time since December 7, 1941, been at war: *Provided,* That an individual who, while in the territory of a nation with which the United States has at any time since December 7, 1941, been at war, was deprived of life or substantially deprived of liberty pursuant to any law, decree, or regulation of such nation discriminating against political, racial, or religious groups, shall not be deemed to have voluntarily resided in such territory; or

(D) an individual who was at any time after December 7, 1941, a citizen or subject of Germany, Japan, Bulgaria, Hungary, or Rumania, and who on or after December 7, 1941, and prior to the date of the enactment of this section [March 8, 1946], was present (other than in the service of the United States) in the territory of such nation or in any territory occupied by the military or naval forces thereof or engaged in any business in any such territory: *Provided,* That notwithstanding the provisions of this subdivision (D) return may be made to an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation: *And provided further,* That, notwithstanding the provisions of subdivision (C) and of this subdivision, return may be made to an individual who at all times since December 7, 1941, was a citizen of the United States, or to an individual who, having lost United States citizenship solely by reason of marriage to a citizen or subject of a foreign country, reacquired such citizenship prior to September 29, 1950, if such individual would have been a citizen of the United States at all times since December 7, 1941, but for such marriage:

And provided further, That the aggregate value of returns made pursuant to the foregoing proviso shall not exceed $5,000,000; and in making returns under such proviso the Alien Property Custodian shall to the extent practicable make such returns in the order in which notices of claims therefor were received and may return any property or interest if the value thereof, taken together with the aggregate value of property and interests already returned pursuant to such proviso, does not exceed $5,000,000; or

(E) a foreign corporation or association which at any time after December 7, 1941, was controlled or 50 per centum or more of the stock of which was owned by any person or persons ineligible to receive a return under subdivisions (A), (B), (C), or (D) hereof: *Provided,* That notwithstanding the provisions of this subdivision (E), return may be made to a corporation or association so controlled or owned, if such corporation or association was organized under the laws of a nation any of whose territory was occupied by the military or naval forces of any nation with which the United States has at any time since December 7, 1941, been at war, and if such control or ownership arose after March 1, 1938, as an incident to such occupation and was terminated prior to the enactment of this section [March 8, 1946]; and

(3) that the property or interest claimed, or the net proceeds of which are claimed, was not at any time after September 1, 1939, held or used, by or with the assent of the person who was the owner thereof immediately prior to vesting in or transfer to the Alien Property Custodian, pursuant to any arrangement to conceal any property or interest within the United States of any person ineligible to receive a return under subsection (a) (2) hereof;

(4) that the Alien Property Custodian has no actual or potential liability under the Renegotiation Act [section 1191 of this Appendix] or the Act of October 31, 1942 (56 Stat. 1013; 35 U. S. C. A. Sections 89-96), in respect of the

property or interest or proceeds to be returned and that the claimant and his predecessor in interest, if any, have no actual or potential liability of any kind under the Renegotiation Act [section 1191 of this Appendix] or the said Act of October 31, 1942 [sections 89-96 of Title 35]; or in the alternative that the claimant has provided security or undertakings adequate to assure satisfaction of all such liabilities or that property or interest or proceeds to be retained by the Alien Property Custodian are adequate therefor; and

(5) that such return is in the interest of the United States.

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